UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

SAMUEL FUENTES, Petitioner,	:	
v.	:	C.A. No. 18-113WES
STATE OF RHODE ISLAND, Respondent.	:	

REPORT AND RECOMMENDATION

PATRICIA A. SULLIVAN, United States Magistrate Judge.

Petitioner Samuel Fuentes has filed an amended habeas corpus petition pursuant to 28 U.S.C. § 2254 challenging the constitutionality of repeated denials of his parole application by the Rhode Island Department of Corrections Parole Board ("Parole Board"). ECF No. 10. The State responded with a motion to dismiss (ECF No. 11), which has been referred to me for report and recommendation. The Court has determined that no hearing is necessary. For the reasons that follow, I recommend that the motion to dismiss be granted and that the amended petition be dismissed.

I. Background and Travel

In 1978, Petitioner was sentenced to two consecutive life sentences for the heinous and premeditated murders of his seventeen-year-old girlfriend and her mother. State v. Fuentes, 433 A.2d 184, 192-93 (R.I. 1981); see Fuentes v. State, No. PM 85-4163, 1989 WL 1110574, at *10-11 (R.I. Super. Sept. 13, 1989) ("That he did kill them both, that he confessed to their murders, that he confessed without coercion of any kind, that he committed the crimes at a time when he was fully cognizant of what he was doing, that he had long planned to do so, that he was clear headed at the time and not suffering from diminished capacity was overwhelmingly clear to the

jury. The malignity of his planned actions has not been undermined by any evidence presented in this postconviction hearing."), aff'd, 598 A.2d 113 (R.I. 1991). Since then, he has remained incarcerated at the Adult Correctional Institutions ("ACI"), now for over forty years.

Since 1997, Petitioner has appeared for hearings before the Parole Board ten times, in 1997, 2002, 2003, 2006, 2008, 2009, 2010, 2012, 2013 and 2014.[1] As Petitioner describes it, the prior hearings all resulted in the denial of parole due to the seriousness of his crimes, in reliance on R.I. Gen. Laws § 13-8-14(a)(2), which lists among the release criteria that "release would not depreciate the seriousness of the prisoner's offense."[2] ECF No. 10 at 3. The Parole Board hearing minutes confirm that the reasons for the denials are consistently summarized as having been based on the serious nature of the two murders as evidenced by Petitioner's two consecutive life sentences; in addition, at the 2009 hearing, the Board observed that it "was not

[1] The Parole Board results for the hearing that is the primary focus of the petition – October 22, 2014 – states that "[w]e will see him again in October 2017." ECF No. 10-1 at 9. Petitioner represents that he was denied parole again in 2017 but, because state remedies to address the adverse 2017 decision are not yet exhausted, he has not addressed this adverse action in his petition. ECF No. 10 at 1 n.1.

[2] R.I. Gen Laws § 13-8-14(a) sets out the release criteria:

(a) A permit shall not be issued to any prisoner under the authority of sections 13-8-9--13-8-13 unless it shall appear to the parole board:

> (1) That the prisoner has substantially observed the rules of the institution in which confined, as evidenced by reports submitted to the board by the director of the department of corrections, or his or her designated representatives, in a form to be prescribed by the director;
> (2) That release would not depreciate the seriousness of the prisoner's offense or promote disrespect for the law;
> (3) That there is a reasonable probability that the prisoner, if released, would live and remain at liberty without violating the law;
> (4) That the prisoner can properly assume a role in the city or town in which he or she is to reside. In assessing the prisoner's role in the community the board shall consider:
>
> > (i) Whether or not the prisoner has employment;
> > (ii) The location of his or her residence and place of employment; and
> > (iii) The needs of the prisoner for special services, including but not limited to, specialized medical care and rehabilitative services; and
>
> (5) That any and all restitution imposed pursuant to section 12-19-32 has been paid in full, or satisfactory arrangements have been made with the court if the person has the ability to pay. Any agreement shall be in writing and it is the burden of the person seeking parole to satisfy the parole board that this requirement has been met. Any person subject to the provisions of this section may request an ability to pay hearing, by filing the request with the court which imposed the original sentence.

comfortable with Mr. Fuentes explanation of why he took the lives of two people"; at the 2010 hearing, the Board expressed concern that it "would like to see Mr. Fuentes without bookings and to encourage him to take part in one on one counseling"; and at the 2012 hearing, the Board noted that it "feels strongly that he needs to serve more time." ECF No. 10-1 at 5-8.

The hearing that is the focus of the petition took place on October 22, 2014. The hearing transcript reveals that Petitioner appeared with an attorney;[3] both he and his attorney addressed the Board. ECF No. 10-4 at 4-15. She presented arguments in favor of parole and Petitioner was permitted to speak for himself; throughout the hearing, he was asked detailed and specific questions by several Board members regarding the seriousness of the crimes, and his thoughts about how and why they happened. Id. One Board member asked him about an attempted murder committed three years prior to the underlying crimes. ECF No. 10-4 at 12. Based on the questions asked during the hearing, the Board learned of the impossibility of Petitioner's pre-hearing plan for release to his brother in New Jersey and that he had no concrete alternative proposals, in that he was hoping to live at one of several facilities that would not consider an application until after parole was granted. ECF No. 10-4 at 14 ("I don't think [my brother] wanted me down there."). The Board commended Petitioner's lack of disciplinary bookings at the ACI for the past four years and noted its receipt and consideration of a letter from Petitioner's counselor. ECF No. 10-4 at 7, 13.

During the hearing, the Board chair advised Petitioner and his attorney that parole had been denied in the past because of the seriousness of the crimes, the need to serve more time because of the gravity of the offenses, and his lack of a personal understanding of the motive for the crimes. ECF No. 10-4 at 6. Petitioner was specifically warned that the "facts of your case

[3] In his petition, Petitioner makes no challenge to the adequacy of this attorney's representation.

are very grave . . . and weigh heavily on the minds of this Board." ECF No. 10-4 at 15. Petitioner and his counsel were advised that the parole decision would be taken under advisement and that he would be notified of the decision. ECF No. 10-4 at 13, 15. Both Petitioner and his counsel thanked the Board for the opportunity to be heard and made no objection to any aspect of the proceeding.

After the hearing, the Board issued its decision of denial in written minutes that were sent to Petitioner by mail. ECF No. 10 at 7. The minutes summarize the reasons for denial as follows:

> The reason for the denial is due to the seriousness of Mr. Fuentes' offense, the death of the victim, and the premeditation and level of violence used. We will see him again in October 2017.

ECF No. 10-1 at 9.

Petitioner challenged this decision in a timely post-conviction relief ("PCR") petition, in which he asserts (1) that he was denied parole without adequate justification because the "seriousness of the offense," relied on as a sole criterion and used nine times in a row, is not a proper consideration, was applied inconsistently to others, and amounts to the imposition of a new punishment; and (2) over the years, there have been unduly long and inconsistent intervals between the Parole Board's reconsideration hearings in contravention of the *ex post facto* and due process clauses. With the assistance of counsel (Attorney Melissa Larsen), a PCR hearing was held before Superior Court Justice Netti Vogel on May 9, 2016, at which Petitioner was present. ECF No. 10-2 at 4. During the hearing, Judge Vogel noted that due process was satisfied in that Petitioner was afforded an opportunity to be heard and was informed of the reasons for the denial of parole. ECF No. 10-2 at 6-7. She asked Attorney Larsen whether there are any statutes or cases supporting the proposition that, in these circumstances, a PCR judge

may substitute her own judgment for that of the Parole Board. Attorney Larsen responded, "There's no case law on point that favors my client's position." ECF No. 10-2 at 7. In response to further questions, Attorney Larsen advised that she was aware of no legal authority that could compel the Parole Board to give Petitioner an annual review. ECF No. 10-2 at 8.

The Superior Court decision was delivered by Judge Vogel from the bench and is set out in a transcript filed with the petition. ECF No. 10-2. Noting the Parole Board's appropriate focus on the heinousness of the crimes, Judge Vogel held that, as long as the Parole Board's procedures met minimal due process requirements, it would be an abuse of discretion for the court to substitute its opinion for that of the Parole Board. Id. at 7-12. Because Petitioner was afforded a hearing and a decision explaining the denial, Judge Vogel found that the procedures were sufficient. Id. Citing State v. Ouimette, 367 A.2d 704 (R.I. 1976) and Higham v. State, 45 A.3d 1180 (R.I. 2012), as well as in reliance on the broad discretion vested in the Parole Board by R.I. Gen. Laws § 13-8-14(a)(3) to deny parole unless there is a reasonable probability that the prisoner, if released, would live and remain at liberty without violating the law," and in consideration of the seriousness of the offense pursuant to R.I. Gen. Laws § 13-8-14(a)(2), Judge Vogel denied the PCR petition. ECF No. 10-2 at 12; ECF No. 10-3 at 11.

Assisted by a different attorney (Carl Ricci, Esq.), Petitioner sought the issuance of a writ of certiorari from the Rhode Island Supreme Court. Citing Thwaites v. New York State Board of Parole, 934 N.Y.S.2d 797 (N.Y. Sup. Ct. 2011), a case that deals with a New York state law issue, Petitioner's argument focused on the inappropriateness of the Parole Board's consistent emphasis on the seriousness of the offense, which, he argued, after forty years essentially amounts to a conversion of his consecutive life sentences to life without parole. Id. at 801 (because New York parole board focused only on past crime and failed to follow recently

enacted New York statute, case remanded for new parole hearing). Attorney Ricci did not raise any claim based on ineffective assistance by Attorney Larsen. He did not argue the writ should issue because her performance was deficient for any of the reasons Petitioner now cites: that she had failed to brief and argue the law Petitioner had supplied to her, and failed to investigate and perfect Petitioner's claims, as well as that she had advised Judge Vogel that no cases or statutes supported the PCR petition, when "non-frivolous arguments" (as Petitioner describes them) had been developed by Petitioner himself. Attorney Ricci prepared and filed a petition for writ of certiorari lacking any claim of ineffective assistance, which was summarily denied without opinion by the Rhode Island Supreme Court on January 29, 2018. ECF No. 10-4 at 2.

Having exhausted state remedies as to all claims except ineffective assistance of counsel, Petitioner timely filed his habeas petition in this Court on March 6, 2018. ECF No. 1. He also filed a motion for appointment of counsel, which was denied. After the State responded with its first motion to dismiss, Petitioner was given leave to file an amended petition, which he submitted on May 29, 2018. The State again responded with the pending motion to dismiss.

Petitioner's amended habeas petition asserts six claims for relief: (1) the Parole Board repeatedly denied him parole with inadequate justification; (2) the Parole Board created unduly prolonged intervals between reconsiderations; (3) the Parole Board's denial was unsupported by any evidence and thus violated his constitutional rights to substantive due process and equal protection, as well as his right to be protected from *ex post facto* laws and double jeopardy; (4-5) both the Superior Court PCR counsel (Attorney Larsen) and PCR appellate counsel (Attorney Ricci) provided ineffective assistance in contravention of his rights under the Sixth Amendment; and (6) the Superior Court's denial of his PCR petition was an unreasonable application of federal law. ECF No. 10. Based on these claims, Petitioner asks the Court to grant his

immediate release, to remand the case to the Parole Board with an order to release him, to grant an evidentiary hearing with appointed counsel, or to reconsider the denial of the motion for appointment of counsel so that he might perfect his ineffective assistance claims. ECF No. 10 at 11.

II. Standard of Review

Section 2254 provides that a district court "shall entertain an application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a); see Estelle v. McGuire, 502 U.S. 62, 68 (1991) ("In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States."). The applicable standard is set forth in the Antiterrorism and Effective Death Penalty Act of 1996, which precludes the granting of habeas relief to a state prisoner unless the state court decision was either "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). To grant habeas relief, the state court decision must be objectively unreasonable as opposed to merely incorrect. Bell v. Cone, 535 U.S. 685, 694 (2002). "[T]his standard is difficult to meet . . . because it was meant to be." Harrington v. Richter, 562 U.S. 86, 102 (2011). Importantly, "federal habeas corpus relief does not lie for errors of state law." Lewis v. Jeffers, 497 U.S. 764, 780 (1990).

III. Law and Analysis

A. Claim Nos. 1, 3 and 6 – "Seriousness of the Offense," Sufficiency of Evidence and Reasonableness of Superior Court's Application of Federal Law

At the core of the petition is the constitutionality of the Parole Board's repeated denial of parole in reliance on the "seriousness of the offense" pursuant to R.I. Gen. Laws § 13-8-14(a)(2). In considering this question, this Court must be laser-focused on whether there is a federal right at stake, as § 2254 requires. Swarthout v. Cooke, 562 U.S. 216, 222 (2011). In Swarthout, the seminal decision on the appropriate scope of federal review of state parole decisions, the Supreme Court reaffirmed its 1979 decision in Greenholtz v. Inmates of Neb. Penal & Corr. Complex, 442 U.S. 1, 12 (1979) and held that "[t]here is no right under the Federal Constitution to be conditionally released before the expiration of a valid sentence, and the States are under no duty to offer parole to their prisoners." 562 U.S. at 220. It further held that, when a state opts to create a parole scheme that gives rise to a liberty interest, "[i]n the context of parole, we have held that the procedures required [by the Due Process Clause] are minimal." Id. That is, a prisoner subject to a parole statute receives adequate process if he is allowed an opportunity to be heard and is provided a statement of the reasons why parole was denied. Id. (citing Greenholtz, 442 U.S. at 16). As Swarthout emphasizes, "That should [be] the beginning and the end of the federal habeas courts' inquiry into whether [petitioners] received due process." Id.

There is no need for this Court to decide whether the Rhode Island statutory parole scheme gives rise to a liberty interest;[4] whether it does or does not, the petition founders because

[4] Petitioner's principal case, State v. Ouimette, 367 A.2d 704, 711 (R.I. 1976), holds that there is a liberty interest; however, Ouimette was probably abrogated by Greenholtz. See Jenner v. Nikolas, No. 4:14-CV-04147-KES, 2015 WL 4600352, at *6 (D.S.Dak. July 29, 2015), aff'd, 828 F.3d 713 (8th Cir. 2016). It was certainly overruled by Lerner v. Gill, 463 A.2d 1352, 1365 (R.I. 1983). In Petrarca v. Rhode Island, 583 F.Supp. 297, 301-02 (D.R.I. 1984), this Court held that R.I. Gen. Laws § 13-8-14.1 "now" creates a cognizable liberty interest. More recently, this Court has held that, "[b]ecause the state parole statute, as interpreted by the RISC, does not contain mandatory language creating the expectancy of release, [the prisoner] does not have a cognizable liberty interest in parole." Brown v. Wall, C.A. No. 07-330 ML, 2008 WL 519982, at *6 (D.R.I. Feb. 25, 2008) (citing DeCiantis v. State, 666 A.2d 410, 413 (R.I. 1995)). By contrast, the Rhode Island Supreme Court recently reaffirmed that parole revocation proceedings do require a minimal degree of due process protection. Jefferson v. State, 184 A.3d 1094, 1098 (R.I. 2018).

Petitioner plainly received the constitutionally minimal due process required by Swarthout and Greenholtz. The Parole Board conducted a hearing at which he was represented by counsel and during which both he and his attorney were allowed to present testimony and argument as they deemed pertinent and Board members asked questions appropriately focused on the statutory release criteria listed in R.I. Gen. Laws § 13-8-14. And after the hearing was over, Petitioner was provided with written notice of the Board's reasons for denying parole.

To support his argument that reliance on "seriousness" triggers a federal constitutional violation, Petitioner asks the Court to consider the holding of U.S. ex rel. Scott v. Ill. Parole & Pardon Bd., 669 F.2d 1185, 1191 (7th Cir. 1982). There are two problems with Scott. First, it actually holds that there is no federal constitutional problem with a parole decision based on the seriousness of the offense, as long as the parole board considered the inmate's specific conduct (as the Parole Board clearly did here), and not just the statutory offense for which the petitioner had been found criminally liable; Scott also rejects without analysis the claim of an equal protection violation, which seems to be based on a quirk of state law. Id. at 1187, 1191. The other problem with Scott is that it was overruled by Heidelberg v. Ill. Prisoner Review Bd., 163 F.3d 1025, 1027 (7th Cir. 1998), because Illinois' parole statute does not create a legitimate expectation of parole. Scott does not advance Petitioner's cause.

Petitioner also asks the Court to consider cases decided by the State of New York. This argument is equally unavailing – all of these cases focus on New York state law, which prohibits undue emphasis on the "static factor of the seriousness of the offense" and mandates examination of the "more dynamic present." E.g., Wallman v. Travis, 794 N.Y.S. 2d 381, 386 (N.Y. App. Div. 2005); Thwaites, 934 N.Y.2d at 801-802; Capiello v. New York Parole Board, 800 N.Y.S. 2d 343 (N.Y. Sup. Ct. 2004). Such interpretations of state law should not be considered on a

federal habeas petition. Swarthout, 562 U.S. at 220; Estelle, 502 U.S. at 67-68 ("[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions.").

Petitioner's equal protection claim also goes nowhere. To support it, he cites only the Seventh Circuit's overruled decision, Scott, which mentions in passing, but does not discuss, an equal protection challenge based on a state law anomaly that had been rejected by the district court and was not presented on appeal. See Scott, 669 F.2d at 1187. Nor do the facts set forth in the petition suggest even the possibility of arbitrary classifications unfairly affecting similarly situated persons. See Richland Bookmart, Inc. v. Nichols, 278 F.3d 570, 574 (6th Cir. 2001) ("To withstand Fourteenth Amendment scrutiny, statutes that do not interfere with fundamental rights or single out suspect classifications must bear only a rational relationship to a legitimate state interest."). To the contrary, as required by R.I. Gen. Laws § 13-8-14, and as reflected in Petitioner's hearing transcript, the Parole Board based its decision not on arbitrary classifications, but rather on Petitioner's individual circumstances, including specific facts reflecting the seriousness of his crimes and those related to other parole criteria, such as his lack of a plan for where he would live on release. There is no equal protection violation here. See Jiminez v. Conrad, 678 F.3d 44, 48 (1st Cir. 2012) (parole board that denied petitioner's parole application, but paroled prisoners convicted of same crime with worse disciplinary records, did not violate Equal Protection where prisoner not in protected class and decision was rationally related to state's legitimate interest in imposing stricter parole standards for crime of second degree murder).

Nor is Petitioner's unsupported double jeopardy challenge viable. He grounds the claim in the argument that "since the nature of the crime was taken into account by the court at

sentencing, and for the Parole Board to now re-use those same elements of the crime to repeatedly deny eligibility, then . . . the board has in fact re-used . . . elements of the crime to enhance and aggravate his sentence." ECF No. 10 at 5-6. This argument collapses because the Supreme Court has never held that the prosecutions and punishments that implicate the double jeopardy clause would encompass the parole determination. Averhart v. Tutsie, 618 F.2d 479, 483 (7th Cir. 1980) ("denial of parole merely perpetuates the status quo: the prisoner remains incarcerated under a validly imposed sentence"); Tillery v. Pa. Bd. of Prob., C.A. No. 15-4799, 2016 WL 5339711, at *6 (E.D. Pa. Aug. 29, 2016) (recommitment of parole violator for unexpired portion of a sentence does not violate Double Jeopardy); Bartlett v. Mass. Parole Bd., C.A. No. 13-11479-WGY, 2013 WL 3766747, at *7 (D. Mass. July 15, 2013) ("the denial of parole is neither the increase nor imposition of a sentence").

Greenholtz expressly approved the "seriousness of the offense" as an appropriate parole criterion, as long as minimal due process is afforded to the prisoner. 442 U.S. at 11. And Swarthout rejected as an improper intrusion into state law issues a federal court's critique of a parole board's supposed failure to marshal sufficient evidence or to make individualized findings to support its decision. 562 U.S. at 220. Guided by these principles of federal law as established by the Supreme Court, I find that Petitioner was clearly afforded all that is necessary. Far from unreasonably applying established federal law or unreasonably determining facts in light of other evidence, the Superior Court[5] correctly focused on and applied these federal law principles to the undisputed facts presented at the PCR hearing. Williams v. Taylor, 529 U.S. 362, 409 (2000) ("Stated simply, a federal habeas court making the "unreasonable application" inquiry should ask whether the state court's application of clearly established federal law was objectively

[5]As the Supreme Court held in Wilson v. Sellers, 138 S.Ct. 1188, 1192 (2018), federal habeas law employs a "look through" presumption, whereby it examines the state's last reasoned judgment rejecting a federal claim.

unreasonable."). Therefore, Claim No. 1, based on the Parole Board's reliance on the seriousness of the offense, Claim No. 3, based on the Parole Board's failure to rely on sufficient evidence, and Claim No. 6, based on the allegation that the Superior Court unreasonably applied federal precedents, all fail to establish any violation of any federal constitutional or statutory rights. Accordingly, the motion to dismiss Claim Nos. 1, 3 and 6 should be granted.

B. Claim No. 2 – Intervals between Parole Reconsideration

Claim No. 2 challenges the varied intervals between the Parole Board's reconsiderations of whether Petitioner should be paroled. Citing Garner v. Jones, 529 U.S. 244 (2000), Petitioner alleges that the variation, or any interval longer than one year, amounts to an improper *ex post facto* law. While Petitioner concedes that Rhode Island's flexible scheme (with no mandatory interval) has not changed during the period in issue, 1997 through 2014, he claims that the Parole Board's guidelines in 1978 "afforded annual reviews."[6] ECF No. 10 at 6. Assuming this claim to be true, Garner still does not advance Petitioner's cause. Despite a change in the regulatory scheme that increased the mandatory cap on the interval between parole reconsideration, Garner rejected the Court of Appeals' determination that the change amounted an *ex post facto* law. 529 U.S. at 255. Rather, Garner holds that the prisoner must demonstrate that the amended rule created a significant risk of increased punishment for him in order for such a change to have an unconstitutional *ex post facto* effect. 529 U.S. at 255-57. Importantly, Petitioner does not allege

[6] The Rhode Island Parole Board Guidelines for 2018 may be reviewed on the Board's website. 2018 Guidelines – Standards for Parole § 13-8-14.1 (R.I. Parole Bd.): http://www.paroleboard ri.gov/guidelines/2018%20PB%20Guidelines%20as%20AMENDED%20and%20FINAL.pdf. These reflect that the Board has the authority "to schedule a reconsideration hearing at an interval proportionate to the time remaining on the inmate's sentence," which shall not exceed six years." 2018 Guidelines – Standards for Parole § 13-8-14.1 (R.I. Parole Bd.). These Guidelines also stipulate that the interval provision shall operate prospectively only. Id. Petitioner provides no citation to Parole Board Guidelines from 1978, nor did the State identify any, nor has the Court been able to locate any. Given the unlikelihood of ascertaining the accuracy of Petitioner's assertion that annual review was mandatory in 1978, the Court assumes it to be true. Nevertheless, there is no *ex post facto* violation. Cal. Dep't of Corr. v. Morales, 514 U.S. 499, 514 (1995).

or seek to establish that the alleged alteration from annual review in 1978 to flexible review intervals since 1997 has exposed him to increased punishment.

Far closer to the facts undergirding Petitioner's Claim No. 2 is the Supreme Court's decision in California Dep't of Corrections v. Morales, 514 U.S. 499 (1995). In Morales, the law in place at the time of the prisoner's sentencing entitled him to annual review, but after he was sentenced, the law changed, authorizing the board to defer review for up three years. 514 U.S. at 503. Nevertheless, the Court found no *ex post facto* violation, emphasizing that not every retroactive procedural change creates a risk of affecting an inmate's terms or conditions of confinement. Id. at 511-12. In so holding, the Court observed the appropriateness of vesting the board with the authority to tailor the frequency of reviews to the particular circumstances of the individual prisoner. Id. at 514 ("legislation at issue creates only the most speculative and attenuated risk of increasing the measure of punishment. . . . [J]udgment that the amendment violates the *Ex Post Facto* clause is accordingly reversed.").

Morales clinches the matter – whatever the interval may have been at the time Petitioner was sentenced, the Parole Board's current discretion in tailoring the interval based on Petitioner's individualized circumstances does not violate federal law, nor does the alleged change from annual review to the current discretionary system transgress any federal constitutional right. Nor does the Board's interval variation offend substantive due process or equal protection. See Swarthout, 562 U.S. at 220 (adequate process is "the beginning and the end of the federal habeas courts' inquiry" into whether petitioners received due process); Richland Bookmart, 278 F.3d at 574. Consequently, Claim No. 2 should be dismissed.

C. Claim Nos. 4 and 5 – Ineffective Assistance of Counsel

Pursuant to Strickland v. Washington, 466 U.S. 668, 687 (1984), to prove ineffective assistance of counsel, a petitioner must demonstrate both a deficient performance and prejudice. Sexton v. Beaudreaux, 138 S.Ct. 2555, 2558 (2018) (citing Strickland). Citing Anders v. California, 386 U.S. 738, 744 (1967), Petitioner contends that Attorney Larsen's representation of him in connection with the PCR petition in Superior Court was so pervasively deficient as to amount to a complete denial of the right to assistance of counsel resulting in a Sixth Amendment violation, without regard to whether he was prejudiced. He also argues that Attorney Ricci was ineffective in not raising Attorney Larsen's deficient performance.

This reliance on ineffective assistance fails not only because of Petitioner's failure to raise ineffective assistance of counsel when he appealed to the Rhode Island Supreme Court, thereby raising the specter of a state procedural default, but also because the Supreme Court has clearly held that no federal right is implicated in these circumstances. See Davila v. Davis, 137 S. Ct. 2058, 2062 (2017). In Davila, the prisoner's post-conviction counsel failed to challenge an allegedly flawed jury instruction and post-conviction appellate counsel failed to argue that the post-conviction attorney had been ineffective. Id. at 2063. Noting that '[i]t has long been the rule that attorney error is an objective external factor providing cause for excusing a procedural default only if that error amounted to a deprivation of the constitutional right to counsel," and that there is no federal constitutional right to counsel in state post-conviction proceedings, the Supreme Court held that ineffective assistance in post-conviction proceedings does not qualify as cause to excuse procedural default. Id. at 2065. Guided by Davila, and based both on Petitioner's state procedural default and the lack of a federal constitutional right to counsel at the post-conviction stage, I recommend that the Court dismiss Claim Nos. 4 and 5. See Doyle v.

Massachusetts, C.A. No. 15-13328-PBS, 2016 WL 5387657, at *5 (D. Mass. August 5, 2016) (habeas dismissed because ineffective assistance claim procedurally barred).

Alternatively, if this Court were to step past the procedural default and the lack of a federal right to post-conviction counsel to consider the merits of Petitioner's claim of ineffective assistance, it remains clear that Petitioner's ineffective assistance claim is unavailing. For starters, Petitioner has not demonstrated prejudice as required by Strickland; rather, he argues that he is entitled to an Anders presumption of prejudice. However, unlike the attorney in Anders, Attorney Larsen did not withdraw from the engagement, did not file a brief asserting that Petitioner's claim was without merit and did not refuse to represent Petitioner; to the contrary, she filed briefs and presented arguments on Petitioner's behalf. Therefore, Petitioner's reliance on Anders is misplaced. As the Supreme Court more recently clarified in Smith v. Robbins, 528 U.S. 259, 284-88 (2000), only an absolute denial of counsel warrants a presumption of prejudice. Because Petitioner was provided with counsel and has not demonstrated prejudice, he cannot meet Strickland's prejudice prong.

As to deficiency, while Petitioner criticizes Attorney Larsen for failing to present the inapplicable and/or overruled cases that Petitioner himself had cited, the Court has already found that these omitted arguments are frivolous. Nor is there anything deficient in Attorney Larsen's ethically appropriate response to Judge Vogel's direct question when she advised the Superior Court that no cases or statutes supported Petitioner's challenge to the Parole Board's actions. Simply put, this simply is not a case where there were "non-frivolous direct appeal issues" that Attorney Larsen failed to raise. See Lombard v. Lynaugh, 868 F.2d 1475, 1484 (5th Cir. 1989) (counsel filed brief asserting that prisoner's appeal was without merit in case where court found non-frivolous direct appeal issues; performance so pervasively defective as to entitle prisoner to

habeas relief). Accordingly, Petitioner's claim of ineffective assistance by Attorney Larsen (and by Attorney Ricci in not raising Attorney Larsen's ineffective assistance on appeal) must also fail because Petitioner has not demonstrated that either attorney provided him with a "deficient performance."

For all of these reasons, I recommend that Claim Nos. 4 and 5 should be dismissed.

IV. Conclusion

Based on the foregoing, I recommend the State's motion to dismiss (ECF No. 11) be GRANTED and that the amended petition for issuance of the writ of habeas corpus pursuant to 28 U.S.C. § 2254 be DENIED and DISMISSED. Any objection to this report and recommendation must be specific and must be served and filed with the Clerk of the Court within fourteen (14) days after its service on the objecting party. See Fed. R. Civ. P. 72(b)(2); DRI LR Cv 72(d). Failure to file specific objections in a timely manner constitutes waiver of the right to review by the district judge and the right to appeal the Court's decision. See United States v. Lugo Guerrero, 524 F.3d 5, 14 (1st Cir. 2008); Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603, 605 (1st Cir. 1980).

/s/ Patricia A. Sullivan
PATRICIA A. SULLIVAN
United States Magistrate Judge
July 23, 2018